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No. 584

IN THE

Supreme Court of the United States

October Term, 1948

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

—v.—

BROADCASTING SERVICE ORGANIZATION, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BROADCASTING SERVICE ORGANIZATION, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The Decision and Order of the Federal Communications Commission (R. 539-568, 600-601) have not yet been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 608-620) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 24, 1948 (R. 620-621). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

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Question Presented

Whether the Court below erred in holding that, as a matter of law, the Federal Communications Commission is not empowered by the provisions of the Communications Act of 1934, as amended, and the Decision of this Court in the *WOKO* case (329 U. S. 223) to deny the application for renewal of license of Station WORL on the ground that respondent does not possess the character to be entrusted with the responsibilities of a licensee, there being no substantial evidence to support the findings and conclusions of the Commission with respect thereto.

Statute Involved

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* are set forth in the appendix to the Government Petition for Writ of Certiorari, pages 23-26.

Statement of Case

Because of certain inaccuracies and inadequacies in petitioner's statement of the case, respondent finds it necessary to review in detail the facts established by the record.

Broadcasting Service Organization, Inc. has been the licensee of Station WORL, which operates in Boston, Massachusetts, on 950 Kc., with 1 KW, daytime only, since November 20, 1931. That it has been and is rendering a meritorious program service in the public interest, convenience or necessity is established by the record and not questioned by the Commission (R. 288-296).

On May 27, 1944, respondent filed an application pursuant to Section 309 (a) of The Communications Act of 1934, as

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amended, for renewal of its station license. Thereafter, this application was designated for hearing. The hearing was held in the fall of 1944 before an Examiner designated by the Commission.

Present Organization of Respondent.

Broadcasting Service Organization, Inc. is a Massachusetts corporation with outstanding capital stock consisting of 1000 shares of non-voting Class A preferred and 1000 shares of voting common designated as Class B. Since November 1943 the officers, directors and stockholders have been:

Name	Office	A Stock	B Stock (Voting)
Harold A. Lafount	Director-President	1000	400
Sanford H. Cohen	Director	—	400
George Cohen	Treasurer	—	200
Robert E. Davison	Director-Clerk Secretary	—	—

(R. 235, 355, 391)

All are citizens of the United States and possess the qualifications required of officers, directors, and stockholders of a licensee corporation. In 1927, after a successful business career, Harold A. Lafount was appointed a member of the Federal Radio Commission. He left the Commission in 1934 and since then has been employed as General Manager of all the radio interests of Mr. Arde Bulova (R. 21-23, 305). Sanford H. Cohen, a former Assistant United States Attorney, and George Cohen are brothers who have been associated in the practice of law in New York City since 1920. Robert H. Davison of Boston is an attorney-at-law of highest reputation (R. 26, 27, 83, 225-27, 279, 305-6).

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The 1937 Agreements.

Prior to March 25, 1937 the stock of the licensee was distributed as follows:

Name	A Stock	B Stock
George A. Crockwell	400	200
James K. Phelan	300	150
William H. Eynon	300	150
Robert C. Nordblom	—	500

(R. 354, 386)

Station WORL had been steadily losing money and the stockholders decided to sell the stock (R. 62, 322). Negotiations were held with Crockwell. Nordblom, Crockwell, Phelan and Eynon entered into an agreement between themselves of their intended sale of 700 shares of the stock owned by them in the corporation owning and operating Radio Station WORL (R. 382). Lafount had nothing to do with this agreement and was not even aware of its existence (R. 57-8, 67, 71).

On March 16, 1937, Crockwell, Nordblom and Lafount entered into an agreement for the transfer of 400 shares of B Stock (300 to be supplied by Crockwell and 100 by Nordblom) to Lafount for a consideration of $48,000.00. Crockwell and Nordblom undertook to pay all the debts of the corporation existing on March 25, 1937 (with certain exceptions) from the proceeds of the sale, to reduce the liquidating value and the annual dividends of the preferred stock, and to cause certain changes in the by-laws of the corporation. The closing was set for March 25, 1937 (R. 385).

On March 25, Crockwell, Nordblom, Phelan, Eynon, Lafount and Ben S. .Fisher (attorney for Lafount and the Cohens) met at the office of Robert H. Davison, attorney

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for the licensee and its stockholders. An escrow agreement was entered into between Crockwell, Nordblom, Lafount and Davison providing that $48,000 was to be paid to Davison as escrow agent to pay off the debts of the corporation, the balance to be distributed 62½% to Crockwell and 37½% to Nordblom (R. 74, 75, 80, 81, 393). The Cohens not being present at the closing, Ben S. Fisher, as Agent, entered into a separate agreement with Nordblom whereby he (as such agent) agreed to purchase 300 shares of Class B stock for $4,500 (R. 396). A cashier's check in the amount of $52,500 was delivered by Lafount to Davison in payment for the 400 shares purchased by Lafount and the 300 shares purchased by the Cohens (R. 82-83). Temporary certificates were issued, one to Lafount for 400 shares and one to Nordblom for 300 shares. The latter was endorsed by Nordblom in blank and delivered to Lafount. The temporary certificate for 300 shares was issued in Nordblom's name because Lafount did not know at that time how the Cohens wanted their 300 shares apportioned between them (R. 106, 109, 115, 116). No arrangement was made at the closing as to how the permanent certificates were to be issued (R. 104). Though all the agreements were closed simultaneously, Lafount at all times considered his purchase of the 400 shares and the Cohens' purchase of 300 shares as separate transactions. They were two distinct purchases negotiated separately and based on separate contracts (R. 62-3, 76, 77, 83, 120, 172-3, 333).

Lafount's acquisition of 400 shares of Class B stock was reported to the Commission on March 31, 1937 (R. 399). Of the $48,000 Lafount paid for his 400 shares of B stock, $38,000 was used to pay off the existing debts of the corporation. The Cohens had agreed with Lafount that they would pay their share of the debts and that the cost of the 700 shares should be divided on a per share basis to equalize

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the purchase price, Lafount's cost being $30,000 and the Cohens' $22,500 (R. 27, 76, 150, 151, 228, 243). For this reason the "Amount Actually Paid for Stock" by Lafount was reported as $30,000 (R. 112, 399). The consideration for the 600 shares of Class A stock acquired by Crockwell was reported as $26,400, the par value of $44 per share. The report of March 31, 1937 was prepared by Davison, Crockwell's attorney. At the time it was filed Lafount had no detailed knowledge of the arrangements among Crockwell, Nordblom, Eynon and Phelan for the settlement of the value of the A stock among themselves (R. 56, 66, 74, 399).

Claims Made Against the Stock.

Shortly after the closing date Crockwell started complaining to Lafount about the deal. He called frequently on Lafount, telling him that he wished to get the station back. He stated that Nordblom was dissatisfied too and something had to be done about it (R. 30-31, 103, 117, 155-157). Crockwell discussed his dissatisfaction with Nordblom and with many others. The subject was also considered at a number of directors' meetings (R. 332-333, 335-336, 339, 340). Though Crockwell was telling Lafount that Nordblom was dissatisfied, the latter never made any complaints or claims and testified that he never was dissatisfied with the transaction (R. 110, 327). The evidence is conflicting as to whether Nordblom ever expressed any dissatisfaction to Lafount. However, there is no question that Crockwell led Lafount to believe that both he and Nordblom were very displeased with the whole deal. Furthermore, it is clear that shortly after the March 1937 closing a dispute had arisen between Crockwell and Nordblom which continued over a considerable period of time (R. 110, 117-118, 155-158, 362). As all the negotiations leading up to the

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March 25, 1937 closing had been conducted with Crockwell, and as he had made all the complaints, Lafount attempted to straighten things out with him rather than with Nordblom whom he hardly knew (R. 30-31, 57-58, 117).

These complaints were received before Lafount had ascertained how the Cohens wished to have their 300 shares divided. When Lafount advised the Cohens of Crockwell's complaints, *they refused to permit the permanent certificates for the 300 shares to be issued in their names until all dissatisfaction had been ironed out and no further claims against the stock were outstanding* (R. 34-35, 109, 121, 143, 175-176, 228-229, 250). Pending the settlement of the differences a permanent certificate was issued in the same form as the temporary one. Nordblom endorsed it in blank, and on April 30, 1937 it was sent to Lafount. Nordblom testified that he did not recall why he permitted the stock to remain in his name but *believed* it was a matter of convenience to the buyers. He was glad, however, to remain a voting stockholder with 400 shares because the station was a tenant of the hotel he ran and it was good business for him to watch its progress (R. 32, 340, 342).

Early in 1939, before any settlement had been reached with Crockwell, both Davison and Crockwell advised Lafount that a Miss Natalie Whitwell claimed to own all the stock of the corporation (R. 31, 176, 222, 252, 333, 339-340, 359-360). On July 21, 1941 Hines, counsel for Miss Whitwell, wrote Lafount demanding that all the outstanding stock of the corporation be turned over to his client (R. 261-262, 361). In January 1942 Miss Whitwell brought a suit at law against the corporation in Massachusetts. The court held for the defendants (R. 31, 177-178, 228-230, 261-263). Hines wrote the Commission a series of letters beginning in June 1939 and ending in September 1941 in which he advised the F. C. C. of the Whitwell claims and complained about the

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ownership of WORL. As late as December 15, 1943, Hines, in testimony before a Congressional Committee, asserted claims against the Corporation on behalf of Miss Whitwell (R. 254).

Acts of Ownership.

The permanent stock certificate for 300 shares, endorsed in blank by Nordblom, was turned over to Sanford H. Cohen by Lafount immediately upon its receipt and remained in the Cohens' possession thereafter (R. 30, 121, 228, 280). The Cohens could have sold the stock or had it put in their names because the certificate was negotiable (R. 248, 250). However, the Cohens never voted the 300 shares of B stock. While it stood in Nordblom's name they never attended directors' meetings or stockholders' meetings. No dividends were ever paid on the stock (R. 263). Nordblom voted the stock at all times. In fact, he voted 400 shares of B stock at ten stockholders' and directors' meetings from March 5, 1937 up to and including April 16, 1943. There existed no arrangement or understanding governing the stock or the manner in which it should be voted (R. 123-126, 219, 265, 329, 335, 342, 364-373).

Reasons for Not Reporting the Acquisition.

Thus the B stock continued to be owned of record, 400 shares by Lafount, 400 by Nordblom and 200 by Crockwell (R. 33). Both Lafount and the Cohens believed that as there had been no transfer on the books of the Corporation, and as Nordblom remained the record holder of the 300 shares, it was proper for the applicant to report Nordblom as the holder of the stock. They did not think that the status of the stock had changed in any way as the certificates were still in Nordblom's name. They felt that any transfer

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to their names would be unwise at that time for they might wish to rescind the sale and ask for the return of their money. *In their minds the sale remained unconsummated and the deal had not been closed.* The evidence is clear that although the principals might have exercised poor judgment in this respect, if they made a mistake they did not make it in bad faith (R. 34, 112, 115-116, 117, 120, 223, 143, 175-176, 228-229, 250-252, 254, 280, 284). *Similarly, Lafount and the Cohens believed that in view of the circumstances and the uncertainty concerning the final transfer of the 300 shares of B stock to the Cohens it was unnecessary under Section 310(b) of the Act to apply for a transfer of control of the corporation. They did not think there had been a transfer of control within the meaning of the law* (R. 119, 120, 173-174, 254-255). Sanford Cohen was not admitted to practice before the Commission in 1937—his admission occurred in 1940. Commission records show that George Cohen has never been admitted to practice before the Commission. There is no evidence indicating that in 1937 either of the Cohens was familiar with the Rules and Regulations of the Commission. It is fair to infer—as was in fact the case—that in failing to report the transfer the Cohens were relying upon the advice of the attorneys handling the deal—Ben S. Fisher (radio attorney) and Robert H. Davison (R. 236-237).

Unauthorized Purchase of Stock in the Name of Arde Bulova.

On July 12, 1937 at Lafount's request Arde Bulova loaned Crockwell $5,000 on a six months' note underwritten by Lafount and received 200 shares of B stock as security. Six months after the note fell due Bulova foreclosed, and the 200 shares of B stock were sold at auction for $100. In July 1938 Sanford Cohen left on a vacation. Knowing a sale was going to be held, he told Lafount that he would buy the

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stock. Lafount instructed Davison to purchase the stock for Sanford Cohen. Because of some legal technicality which Davison though would delay the transfer if the stock were sold to one other than the pledgee, Davison purchased the stock in Bulova's name on July 28, 1938. When Sanford Cohen returned from California in September, he found the stock had been bought in Bulova's name. The cleanest way to clear title was to have Bulova make a simple assignment of the stock to Cohen so as to show the actual facts. Lafount had advanced the $100 for the purchase and was repaid by Sanford Cohen. Cohen was at all times the owner of the stock (R. 35-36, 137-139, 230-231, 267-270, 402). The purchase in Bulova's name was a mistake; Bulova was greatly annoyed when he discovered that the stock had been bought in his name, because he was not the purchaser and was not interested in the station. Bulova never considered that he had an investment in WORL (R. 203-204, 317, 319-320). This transfer of 200 shares of B stock from Crockwell to Sanford Cohen for a consideration of $100 was reported to the Commission on November 22, 1938. The date of acquisition was given as September 30, 1938, the date when it was assigned by Bulova and issued in Cohen's name (R. 141-142, 204-205, 357, 436).

At the *time the report* was made out *Cohen had paid only $100 for the stock*. The $100 was credited to Crockwell. After the assignment, Cohen advised Bulova that he would attempt to collect the deficiency from Crockwell and that if he did not succeed he would make good to Bulova. No payment was made to Bulova until it became evident that there was no chance to collect from Crockwell. Then Cohen paid Bulova $5,000, the amount of the debt. However, at the time the report was made to the Commission, $100 reflected the actual consideration paid. Sanford Cohen testified that the failure to report the $5,000 might have been an error

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in judgment but the report had been made in good faith (R. 231-232, 268, 270, 319-320).

Transfer of 60% of Voting Stock Reported in 1938.

In report filed with the Commission on November 22, 1938, Harold Lafount was shown as the owner of 400 shares of Class B voting stock, Sanford Cohen the owner of 200 shares, and Robert Nordblom the owner of the remaining 400,—thus indicating that Lafount and Cohen together owned 60% of the voting stock. Although the Commission by this report acquired knowledge that Lafount and Cohen together owned 60% of the voting stock, it did not require that an application for transfer of control of the Corporation be filed (R. 207, 232, 255, 354, 391).

Purchase of Class A Non-Voting Stock.

In March 1939, on the advice of Davison, Lafount bought 900 shares of Class A non-voting preferred stock at auction for $2,450. Through oversight this acquisition was not reported to the Commission on a stock ownership report form until about a year later. Lafount was under the impression that the acquisition had been reported immediately but later found out that it had not. He was shocked when he discovered the omission. As proof of his belief that the acquisition of this stock had been reported, the record shows that, upon an application for construction permit, Lafount's ownership of said 900 shares of Class A stock was set forth (R. 37-38, 98-99, 210-212).

In September 1940, Lafount purchased the remaining 100 shares of A stock from one Endlar for $3,100. This purchase was not reported until April 1941, again through oversight, Lafount being under the impression that it had been reported immediately. The purchase price of the

stock was reported as $3,500., which included $400 legal fees incurred in connection with the purchase (R. 38-39, 208). Lafount's present ownership of all the A stock has been a matter of record with the Commission since April 1941 (R. 354, 391). On July 7, 1942 the Commission granted an application for renewal of license to Station WORL for the period ending August 1, 1944, having full knowledge of this and other reports filed prior thereto.

Purchase of Remaining Interest in B Stock.

In September 1940, besides purchasing Endlar's remaining 100 shares of A stock, Lafount purchased Nordblom's remaining 100 shares of B stock for $1,500. This stock was acquired because there existed a possibility that the corporation would be sold to new interests and in order to do so it was necessary to have possession of all the outstanding stock (R. 140-141). The 100 shares of B stock were purchased from Nordblom for George Cohen at the latter's request. The stock was endorsed in blank by Nordblom and given to George Cohen. The $1,500 paid by Lafount was repaid him almost immediately (R. 245, 280, 285). Shortly after the sale Nordblom expressed dissatisfaction with the deal and stated that he did not want it to go through. He was dissatisfied as to the price and because he understood that the station was to be sold and no sale had taken place. Again George Cohen refused to permit the transfer of the stock in his name and Norblom remained the holder of record. For this reason the transfer was not reported (R. 144, 160-161, 280, 285, 336, 391, 403-404). Nordblom continued to vote the 100 shares as well as the 300 involved in the 1937 transaction. He continued to take an interest in the Corporation, discussed its problems, and attended its meetings. He was glad to remain a stockholder because the station was a tenant of the hotel he ran and it

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was good business for him to watch the progress of the station. *He was also glad to remain because he was dissatisfied with the sale* (R. 335, 340, 342).

Final Settlement of Claims.

The final settlement occurred in November 1943, when Lafount, after consultation with Sanford Cohen, paid Nordblom $750 and received a receipt and general release from

> "all claims * * * not only on account of the purchase of 100 shares of the Class B stock of Broadcasting Service Organization, Inc., but from all other claims arising out of your purchase from me of both Class A and Class B common shares * * *"

The $750 was paid by the Cohens but the release ran to Lafount because he had handled all the negotiations (R. 33-34, 172-173, 350). Though letters written by Nordblom and Davison *prior to the execution of the release* refer to the $750 as being "in full payment for 100 shares," Lafount and Cohen testified that the $750 was to clear up all claims against the 400 shares of B Stock (R. 33-34, 280-281, 406) which is supported by the *receipt and general release* signed by Nordblom referred to above.

The 400 shares of B stock were owned of record by Nordblom until the final settlement of $750 was paid him in November 1943 in final adjustment of all claims (R. 33, 165-166, 281). By this time the Whitwell and other claims had also cleared up. On November 9, 1943 the 100 shares were issued to George Cohen. This was reported on November 15, 1943 (R. 36-37, 146, 439). On November 27, 1943 the remaining 300 shares of B stock standing in Nordblom's name were transferred, 200 shares to Sanford Cohen and

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100 shares to George Cohen and a report of this was filed with the Commission on December 2, 1943. Though $4,500 had been specified as the contract price, $5,000 was reported as the consideration. This was the actual cost to the Cohens at the time the report was made after the various adjustments (R. 34-35, 146, 215-216, 354, 357, 391, 440).

Application for Construction Permit.

In 1937 the licensee filed an application for full time operation of WORL. The application was denied solely on technical grounds of objectionable interference during night time hours. In connection with this proceeding Lafount submitted a balance sheet of the licensee as of April 30, 1937 listing "Cash in Banks $25,362.11." At that time the actual cash in the corporation's bank account was $362.11. Lafount explained that the stockholders actually had the cash available and if the permit had been granted they would have placed the $25,000 in the Corporation's account to pay the cost of construction of the full time operation. The balance sheet was a proposed balance sheet and it should have been so designated. Lafount considered it extremely unfortunate that the accountant who prepared the statement had not included the $25,000 as a liability. He had not intended to infer that the cash stood to the actual credit of the corporation (Docket 4206, 7 F. C. C. Reports 242, 246; R. 298-299, 303, 345-348, 401).

Service Rendered by Station WORL.

When Lafount became President of Broadcasting Service Organization, Inc. in March 1937, the corporation was in bad shape financially. The debts paid off at the closing amounted to $38,000. The station as a whole, including programming, equipment, and accounts receivable, was in very bad shape. As soon as Lafount became President a

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new station manager was hired. Together they succeeded in putting the station on its feet and in furnishing the public with good service. In 1938 the station showed a loss of $11,424, on total receipts of $54,754. In 1943 there was a profit of $25,101 with receipts amounting to $240,468. The Hooper rating rose progressively, putting WORL in a tie for first place during the daytime hours among Boston listeners. All profits were spent to build up the station. Time was regularly donated to at least seventy outstanding national or local organizations as well as to numerous governmental agencies; and the station received the McNinch Award for its outstanding weekly public service programs (R. 351, 353, 374-381, 41, 43-4, 135, 288-296).

Proceedings Subsequent to Hearing.

On October 24, 1945 the Commission adopted a Proposed Decision denying the WORL renewal application. The Proposed Decision held that a transfer of control of respondent had occurred March 25, 1937 without Commission consent, as required by Section 310 of The Communications Act and the Rules adopted pursuant thereto, and also found that respondent had submitted false reports and testimony to the Commission concerning this transfer of control and other matters. The Proposed Decision concluded that the WORL renewal application should be denied because respondent could not be entrusted with the responsibilities of a licensee (R. 475-502).

On November 26, 1945, respondent filed Exceptions to the Proposed Decision accompanied by a Memorandum Brief (R. 503-538). On January 24, 1946, the Commission heard oral argument on its Proposed Decision.

On August 26, 1946, respondent and Bitner Broadcasting Company, a corporation having no present broadcast interests or connection with respondent, filed joint application

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requestion Commission consent under Section 310(b) of The Communications Act for transfer of control of respondent from its present stockholders to Bitner Broadcasting Company for a total consideration of $200,000 (R. 606-607).

On April 23, 1947, the Commission released its Decision adopted April 21, 1947, denying the application for renewal of license of Station WORL and dismissing as moot the pending application for transfer of control of respondent from its present stockholders to Bitner Broadcasting Company. A dissenting opinion was simultaneously issued by E. K. Jett, Commissioner. The dissenting opinion points out that on its facts this case differs from that in *WOKO, Inc.* v. *Federal Communications Commission* (329 U. S. 223), and concludes that since the parties are not guilty of having made false statements and concealments designed to mislead the Commission, the pending applications for renewal of license and for transfer of control of respondent should be granted (R. 565-568).

On May 13, 1947, respondent filed a petition for rehearing pursuant to Section 405 of The Communications Act (R. 569-597). On July 28, 1947, the Commission issued an order setting the petition for rehearing for oral argument which was held October 8, 1947 (R. 598-599). On October 15, 1947, the Commission adopted a Memorandum Opinion and Order simply stating that "After careful consideration of our Decision and Order of April 21, 1947 and the record on which they are based, we have concluded that no sufficient reason has been advanced for departure therefrom * * *". No decision was made on respondent's request in its petition for rehearing for an opportunity at a further hearing to present testimony on the character and integrity of its principals and no decision was made on respondent's contention that dismissal as moot without hearing of the application for transfer of control to Bitner Broadcasting

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Company contravenes Section 309(a) of the Act (R. 600-601). E. K. Jett, Commissioner, simultaneously issued an opinion dissenting from the October 15, 1947 Opinion and Order, in substantially the same language as his dissenting opinion on the April 21, 1947 Decision (R. 602-605).

Respondent has continued to operate Station WORL since the expiration of its last regular license August 1, 1944, by virtue of extensions of temporary license granted by the Commission from time to time.

Reasons for Denying the Writ

1. The petitioner urges that the *WORL* case raises legal issues identical to those decided in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, and therefore "the supervisory jurisdiction of this Court must be exercised in order to vindicate the precedential effect" of this Court's rulings. Respondent's position is that the legal issues in this case are completely different from the issues decided in the *WOKO* case; that the decision of the court below is in conformity with established principles of administrative law; that no new or novel question of importance is presented; and, therefore, there are no special and important reasons for grant of the writ. As hereinafter shown, there is not the slightest justification for any assertion of need to invoke the supervisory jurisdiction of this Court over the court below because of the decision.

It is apparent from a study of the *WOKO* decision that the question presented was whether *admitted concealment* from the Commission of stock ownership for purposes of deception supports a conclusion that the licensee cannot be entrusted to continue its operations in the public interest, convenience, and necessity. In the instant case, the question presented is quite different—to wit, *whether there is sub-*

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stantial evidence to support findings of fact of misrepresentation and concealment of stock ownership, expressly denied by the licensee and its principals, and not controverted by other witnesses, which will support a conclusion that the licensee cannot be entrusted to continue its operation in the public interest, convenience, and necessity. The distinction between the cases is far from putative—it is fundamental, as the decision of the court below points out in detail (R. 615-617). Only the most superficial comparison could result in the erroneous conclusion that the cases involve "slightly variant factual patterns" but "raise legal issues identical to those already authoritatively decided".

Pages 15-19 of the petition cite a list of authorities to support the proposition that a "course of admitted falsifications and concealments, either entirely unexplained or explained by testimony demonstrably unworthy of belief", is sufficient basis from which to draw an inference of wilfulness. Respondent does not take issue with this proposition or with the authorities cited in support thereof. Respondent does, however, take sharp issue with any contention that in this case the record reflects a "course of admitted falsifications and concealments, entirely unexplained or explained by testimony demonstrably unworthy of belief". As indicated above, nowhere in the record is there admission of falsifications and concealments. On the contrary, the record is replete with uncontradicted evidence of good faith on the part of the respondent and its principals, professional men of high standing and good reputation. Any omissions or deficiencies which occurred are fully explained.

As the court below points out, one of the fundamental defects of the Commission decision is that it bases inference upon inference (R. 618). It finds that there have been certain omissions by the licensee from which

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it infers (without evidence) that these omissions were deliberate misrepresentations and concealments, from which it concludes that respondent does not possess the character to continue as the licensee. The fallacy of this reasoning is the complete absence of evidence of wilful misrepresentation or concealment. Bad character cannot reasonably and logically be concluded from failure or delay in the filing of certain reports, particularly when all of the witnesses specifically disavow any intention to conceal or misrepresent and nothing in the record indicates a purpose or object in misrepresentation or concealment.

The opinion of the majority of the Commission (R. 561) admits that "the purpose which may have led the principals in this case to conceal the full extent of the various stock transactions is not entirely clear", and then attempts to justify the Commission's action on the ground that the alleged misrepresentations were willful, of which there is not a scintilla of proof. Commissioner Jett in his dissent correctly stated that the record *does not support the finding* that *any of the parties* are guilty of having made willful misrepresentations (R. 566-567). Evidently, the Court of Appeals likewise concluded—as its opinion shows—that the record *does not support the finding* on which is based the decision to deny the respondent's application for renewal of license, and to deprive the owners of the Corporation of an investment valued at, at least, $200,000.00.

The *Labor Board* and other cases cited on pages 15 and 17 of the petition establish (1) that administrative orders supported by substantial evidence are conclusive on appeal and (2) that administrative agencies may draw reasoned inferences from such findings of fact. The authorities cited do not, however, hold that where, as here, the findings of fact are not supported by substantial evidence, they shall be conclusive on appeal, nor do they hold that unreasonable

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inferences or inference upon inference may be drawn from the facts of record. Substantial evidence is evidence of quality; it must have rational probative force and be adequate to support a conclusion in the mind of a reasonable man. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. 2d 951. Substantial evidence is "more than a scintilla and must do more than create a suspicion of the existence of a fact to be established". *National Labor Relations Board* v. *Columbian Enameling And Stamping Co., Inc.,* 306 U. S. 292, 300. Under the system of law guaranteed by the Constitution, the subsidiary facts must be reached from the evidence and the ultimate facts from the subsidiary facts, not arbitrarily or by assumption or conjecture or by a process contrary to reason, but according to reason. Although inferences are to be drawn by the agency and not by the court, the inferences must necessarily be reasoned inferences. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271. To make an essential finding without supporting evidence is arbitrary action, since a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. *Chicago Junction* case, 264 U. S. 258. See also *Baltimore & Ohio Railroad Company* v. *U. S.,* 5 F. Supp. 929; *Bowit Teller & Co.* v. *Commissioner of Internal Revenue,* 53 F. 2d 381 cert. den. 284 U. S. 690; *National Labor Relations Board* v. *Sheboygan Chair Co.,* 125 F. 2d 436. In short, there must be a reasonable exercise of administrative discretion having a logical relationship to the facts, which is not the case here. The conclusions of the Commission as to wilfulness and intent to mislead, not having been fairly arrived at, and not being supported by substantial evidence, can "justly be said to be palpably wrong and therefore arbitrary." *Leach* v. *Carlisle,* 258 U. S. 138, 140.

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2. Petitioner complains that the decision of the court below recognizes the good public service record and increased financial stability of WORL, whereas this Court in the *WOKO* case rejected the contention that the Commission must take cognizance of the public service record of a station notwithstanding that concealment and misrepresentation had been admitted. The fact is that the court below recognized the ruling of the *WOKO* case that if there is concealment, materiality of such concealment is irrelevant (R. 614, 616). What the court below said on the public service record of WORL is as follows (R. 617-618):

> "In the view of the majority of this court, the record amply supports appellant's protestations of good faith. True, the record is replete with evidence that appellant's agents were careless and inaccurate and, perhaps, lacking in good judgment as to the reports required by the Commission, but none of these characteristics in themselves imply bad faith and it is equally certain and of record that none of these characteristics were projected over to and affected the management and conduct of appellant's business as a radio broadcasting licensee. In fact, appellant's outstanding public service record and its progressively increasing financial stability—both matters of record in this case—expressly negative any such projection."

In petitioner's effort to establish that the court below ignored the decision of this Court in the *WOKO* case, it has distorted the language of the opinion. The statement in that opinion that there are no harmful consequences to the Commission or to the public interest because of respondent's improper reports, is made only in connection with disproval of the poor analogy between this case and criminal

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or tort cases in which intent may be imputed upon a showing of heedlessness of the foreseeable harmful consequences (R. 618).

In Paragraph 13 of the conclusions of its decision denying the WORL renewal of license, the Commission made specific findings on alleged violation of Section 310(b) of the Act by respondent, although the denial is predicated upon alleged misrepresentations and concealments rather than violation of Section 310(b) (R. 563). In view of the conclusions of Paragraph 13, it was entirely proper for the court below to advert to the Commission action of July 7 1942, granting an application for renewal of the WORL license with full knowledge that Lafount and Sanford Cohen had acquired control of the licensee corporation (R. 618-619). This action by the Commission is cited by the court not as a bar to denial of the pending renewal application but rather as an indication of the arbitrariness of the Commission's refusal to renew. The court below specifically held as follows (R. 619):

> "We wish it clearly understood that we are not ruling that, once forgiven, a licensee should always thereafter be forgiven for irregularity in compliance with statute or with rule or regulation. The fallacy of such a rule is obvious. Nor are we ruling that a licensee can with impunity disregard or disobey statute, rule, or regulation. Further, we do not question the power of the Commission, within statutory bounds, to adopt and administer a stricter policy of enforcement of its rules and regulations with regard to revocation or renewal of broadcasting licenses. But the Commission, and this court on review, must constantly be guided by the prevailing purpose of the Communications Act in ascertaining the result in each case which will best serve the

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public interest. In such a determination there is no place for the arbitrary application of pointless technicality *unsupported by substantial evidence.* We hold, therefore, that, *as to this particular case,* taking into consideration all of the circumstances discussed above the Commission's decision of April 21, 1947, was improper as a matter of law and *lacked the support of substantial evidence* and was the result of arbitrary and capricious action by the Commission. Accordingly, pursuant to Section 402 (e) of the Act, the decision of the Commission is reversed and the case remanded to the Commission to carry out the judgment of this court." (Emphasis supplied.)

In reversing the Commission, the court below properly used its judgment on the questions of law raised in the appeal. *S. E. C.* v. *Chenery Corp.,* 318 U. S. 80, 94. It did not substitute its own findings of fact for those of the Commission but held that the findings of the Commission do not rationally support its conclusions as to wilfulness. The court stated that upon independent search, it was unable to find "any single specific portion of the voluminous record before us which would justify the Commission's conclusion of wilfulness" (R. 616). There can be no doubt that determination by the court below under Section 402(e) of the sufficiency of the findings of fact to support the conclusions of law is a proper exercise of the judicial function. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. 2d 554 cert. den. 305 U. S. 613. The Court's decision is not concerned with the wisdom or the expediency of the Commission action, but is directed entirely to consideration whether substantial evidence supports the findings and conclusions drawn, and considera-

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tion of the improper application by the majority of the Commission of the rule of law in the *WOKO* case to the facts of record in this case.[1]

3. Apparently recognizing the necessity of strengthening his doubtful contentions on the similarity of the *WOKO* and *WORL* cases, the petitioner urges as a further ground for grant of certiorari that the court below, which plays "so vital a role in the review of administrative action" is in need of "supervision by this Court" because of its persistent departure from accepted legal principles and substitution of its views for those of administrative agencies. This unwarranted and unjustified attack on the court below, a court long and widely recognized for its competence and experience in administrative law, requires some comment.

Table I of the Appendix to this Brief shows that in the two year period from January 1, 1947, to January 1, 1949, there have been eighty-five petitions filed for writs of certiorari to the court below. Sixty-eight of these petitions have been denied, and one dismissed. At least twenty-six of the sixty-eight petitions denied involved review by the court below of administrative action. In the sixteen cases in which certiorari was granted, six have been affirmed, six have been reversed, and four await decision. Of the twelve cases decided by this Court, six involve review of administrative action, three being affirmed and three reversed. Thus, a total of thirty-two cases involving review of administrative action on which petitions for certiorari

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1 Respondent urged on the court below that the Commission violated Section 309 (a) of the Communications Act in denying a hearing on its application for transfer of control of the licensee corporation to Bitner Broadcasting Company. The court held that in view of its reversal of the decision on other grounds, "it is unnecessary to make a decision at this time" on this contention (R. 619).

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to the court below have been filed, only three resulted in reversal of the decision of the Court of Appeals.

Moreover, only one of the three cases of reversal on review of administrative action involves a determination whether substantial evidence supports administrative findings of fact. *Donaldson* v. *Read Magazine,* 333 U. S. 178, Justices Burton and Douglas, dissenting. The court below has repeatedly given full recognition to the well established rule of law that administrative findings of fact, if based on substantial evidence, are binding on appeal. For instance, in granting enforcement of an order of the National Labor Relations Board, the court recognized that the Board's findings were supported by substantial evidence and further recognized that the court cannot weigh evidence or resolve contradictions in it, if that evidence supporting each conclusion is substantial. *E. Anthony and Sons, Inc.* v. *National Labor Relations Board,* 163 F. 2d 22, cert. den. 332 U. S. 773. In a recent case in which question as to completeness of an administrative record on appeal was raised, the court below carefully enunciated its duties and responsibilities in reviewing orders of administrative agencies and said that "thus restricted and simplified, the function of the court is simply to see if the Commission's factual findings are supported by substantial evidence". *Norris & Hirshberg, Inc.* v. *Securities and Exchange Commission,* 163 F. 2d 689, cert. den. 333 U. S. 867. See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881, cert. den. 332 U. S. 762, 93 L. Ed. 39; *Hurley* v. *Lowe, Deputy Commr., Bureau of Employees' Compensation,* 168 F. 2d 553, cert. den. 334 U. S. 828; *Fields* v. *Hannegan, Postmaster,* 162 F. 2d 17, cert. den. 332 U. S. 773; *Brown Investment Co.* v. *Warner, Register of Copyrights,* 161 F. 2d 910, cert. den. 332 U. S. 801.

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Of the six cases of reversal of the court below cited on Page 21 of the petition, all pose difficult questions of administrative law in the main without precedent. It must be remembered that because of its location at the seat of government, the court below is frequently called upon to decide administrative issues of first impression. Of the six cases cited, only *Donaldson* v. *Read Magazine, supra,* and *Liberty Mutual Insurance Co. v. Cardillo,* 330 U. S. 469 raised issues of support by substantial evidence of administrative determinations. These two cases must be compared with the several more recent cases above reaffirming the principle of finality of administrative action when based on substantial evidence.

It seems clear from the foregoing analysis and cases that, nothwithstanding the ill-advised protestations to the contrary in the Brief of the Petitioner, there is no persistent "trend in the court below" to depart from accepted principles of judicial review and substitute its views for those of administrative agencies.[2] On the contrary, the recent record of the court below on review of the actions of adminis-

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2 In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 US 206, cited on page 21 of petitioner's brief, this Court said that "we do not ordinarily grant certiorari to review judgments based solely on questions of fact". This Court also pointed out that it granted certiorari because of the earnest contention of the Board that this was one of a series of decisions in which the court below (CCA Fifth) had unwarrantedly interfered with the exclusive jurisdiction granted the Board by Congress. The Court of Appeals for the District of Columbia Circuit has evidenced no such trend toward unwarranted interference with the exclusive jurisdiction granted the Commission by Congress. Besides the cases cited in footnote 4, broadcast decisions of the Commission which have recently been affirmed by the court below include *Simmons* v. *Federal Communications Commission* (App. D. C.) No. 9607, decided May 24, 1948, cert. den. 93 L. Ed. 35, and *Mansfield Journal Company* v. *Federal Communications Commission* (App. D. C.) No. 9817, decided March 7, 1949.

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trative agencies is an enviable one by any objective standard.[3]

The petitioner does not amplify the very general assertion of his petition that "the rationale of the decision below is such that, if allowed to stand, the exercise by administrative agencies generally of powers virtually identical to that here claimed by the Commission will be brought into serious question". It is difficult to see how the instant decision, confined as it is to the particular facts of record, can undermine the well established principle as to conclusiveness of administrative findings of fact *when supported by substantial evidence.*[4] The decision specifically recognizes the prior ruling of the court that it is immaterial that evidence before the Commission is susceptible of other conclusions than those drawn by the Commission and that, assuming the presence of substantial evidence, the court will not

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3 Recent cases determining varied questions of administrative law in which decisions of the court below have been affirmed by this Court include *Hannegan* v. *Esquire, Inc.*, 327 US 146; *Clark* v. *Uebersee Finanz-Korporation*, A. G. 332 US 484; *Hilton* v. *Sullivan*, 334 US 323; *Ahrens* v. *Clark*, 335 US 188.

4 It is to be noted that less than a month after its WORL decision, the court below, in affirming a Commission decision preferring one applicant for a new station over another, reaffirmed the ruling of *Black River Valley Broadcasts* v. *McNinch*, 101 F. 2d 235, citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 US 266 that the Commission's "findings, under the law, must be maintained if they are not arbitrary and capricious or erroneous in law, and are based upon substantial evidence". *Bay State Beacon, Inc.* v. *Federal Communications Commission* (App. D. C.), No. 9766, decided December 20, 1948. Moreover, on February 14, 1949, the court below rendered a per curiam opinion in a case argued February 11, 1949 affirming an order of the Commission denying renewal of license of Station WJBW, New Orleans, La. because of violations by the licensee Carlson of the Rules and Regulations. The opinion reads in whole as follows: "We find no error in the record. The decision of the Federal Communications Commission is therefore affirmed". *Carlson* v. *Federal Communications Commission* (App. D. C.), No. 9987, February 14, 1949. A petition for writ of certiorari in the *Carlson* case is being filed April 1, 1949.

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substitute its judgment for that of the Commission. *Yankee Network, Inc.* v. *Federal Communications Commission,* 107 F. 2d 212 (R. 612). Likewise, the decision concedes that where concealment is involved, the question of materiality *vel non* of the facts concealed has been put to rest by the decision of the Supreme Court in the *WOKO* case (R. 616). In effect, the rationale of the decision below is simply that administrative findings of fact and conclusions which are not supported by substantial evidence are arbitrary and capricious and, therefore subject to reversal. This principle of law is as sound and well established as the principle that findings of fact and conclusions when supported by substantial evidence are conclusive. *Crowell* v. *Benson,* 285 U. S. 22; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *Columbian Enameling And Stamping Co., Inc.,* 306 U. S. 292.

4. From the foregoing it is manifest that the decision below does not overstep the legitimate bounds of the judicial function. It does not limit the Commission's power to deny broadcast applications, either for renewal of license or for construction permits, when such denial conforms to the requirement of Section 402(e) of the Communications Act that the findings of fact and conclusions be supported by substantial evidence. The decision does not announce any new or novel standard to determine whether conclusions of law reached by the Commission are arbitrary and capricious, but simply reaffirms settled principles governing judicial review of administrative action. In deciding that, on the facts of this case, the rule of the *WOKO* decision is inapplicable, and that the Commission acted arbitrarily, capriciously, and unreasonably in refusing to renew the WORL license where there was not substantial evidence to

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support its findings of fact of wilful misrepresentation, concealment, and deception, the court below did not render a decision of such importance or of such general effect as to require or justify issuance of a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 31, 1949.

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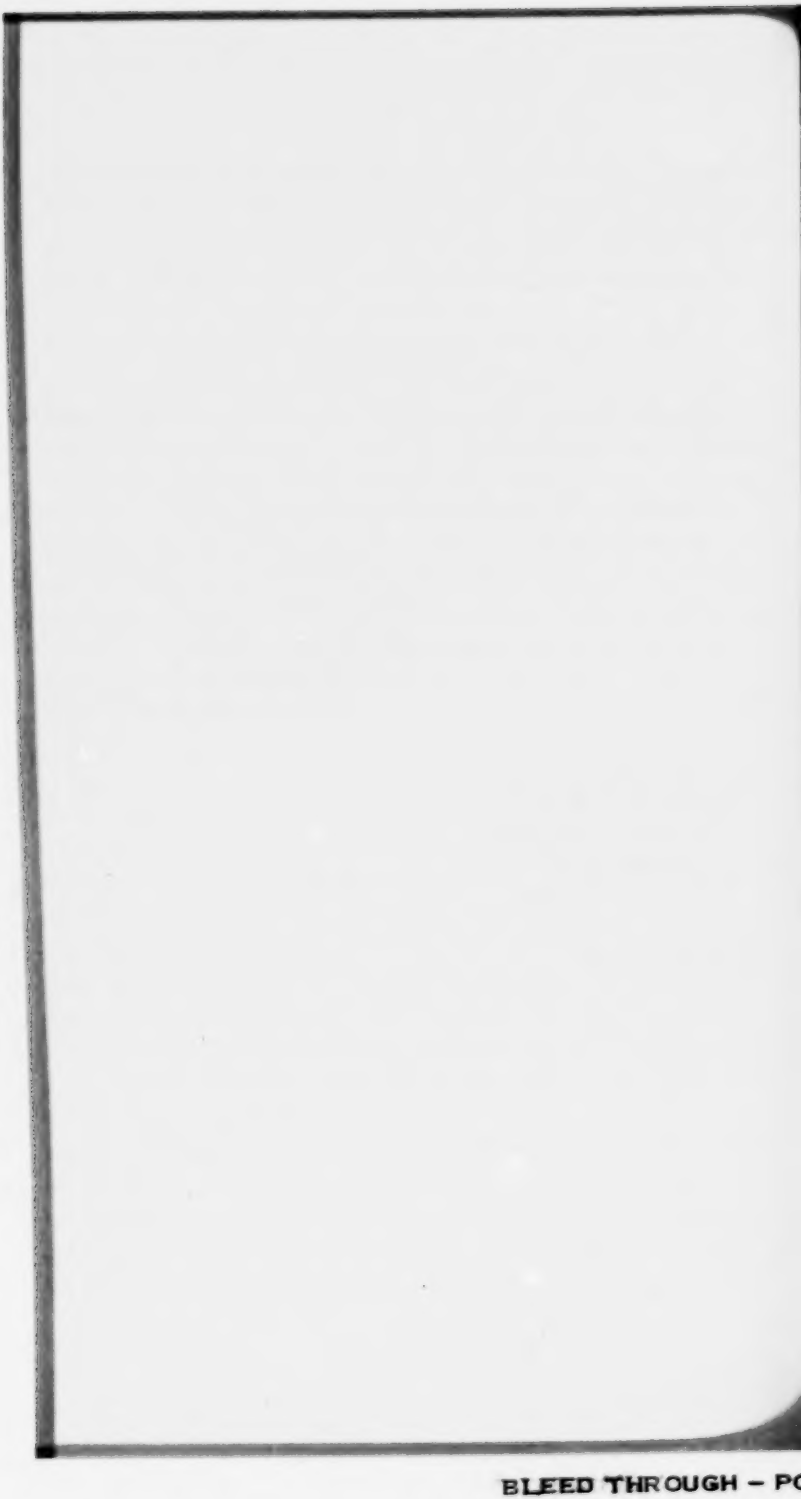

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APPENDIX

TABLE I

Petitions for Writ of Certiorari to The United States Court of Appeals For District of Columbia Circuit
Filed January 1, 1947 to January 1, 1949

(NOTE: Cases marked with asterisks involve administrative agencies)

A. PETITIONS DENIED

Case	No.	Date Filed	Denied
Buckner et al v. Tweed	910	1/18/47	330 US 825
*Friedman v. Swellenbach	990	2/6/47	330 US 838
DMW Contracting v. Stolz	1002	2/10/47	330 US 839
*Pepco v. P. U. C. D. C.	1038	2/17/47	331 US 816
Kinnison v. U. S.	899	1/17/47	330 US 834
Hasson v. U. S.	1013	2/10/47	331 US 808
*Garrett v. D. C.	1014	2/11/47	330 US 835
Thomas v. U. S.	1034	2/15/47	331 US 822
T. Higgins v. U. S.	1079	2/28/47	331 US 822
Hawkins et al v. U. S.	1097	3/4/47	331 US 830
*U. S. v. P. U. C.	1135	3/17/47	331 US 816
Hensley v. U. S.	1138	3/18/47	331 US 817
B. Higgins v. U. S.	1177	3/28/47	331 US 840
*Young v. Anderson	1194	4/3/47	331 US 824
Curley v. U. S.	1211	4/5/47	331 US 837
Smith v. U. S.	1235	4/11/47	331 US 837
*Jones & Laughlin v. United Mine Workers	1236	4/12/47	331 US 828
Case v. Government	1250	4/15/47	331 US 826
Mellen v. Hirsch	1322	5/5/47	331 US 845
Giddings v. Zellan	1490	6/1/47	332 US 759
*D. C. v. Johnson & Wimsatt	1504	6/18/47	332 US 760
*D. C. v. H. D. Lee Co.	1505	6/18/47	332 US 760

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Case	No.	Date Filed	Denied
*Panhandle Eastern Pipe Lines v. F. P. C.	147	6/24/47	332 US 762
Boone v. Boone	204	7/10/47	332 US 766
*Fields v. Hannegan	284	8/20/47	332 US 773
*Brown Instrument Co. v. Warner	304	8/27/47	332 US 801
*Anthony & Sons v. N. L. R. B.	286	8/21/47	332 US 773
Burns v. Spiller	305	8/29/47	332 US 792
Pelley v. Matthews	350	9/16/47	332 US 811
*Beckham v. D. C.	417	10/27/47	332 US 825
Field v. U. S.	458	11/26/47	332 US 851
*Young Spring & Wire v. N. L. R. B.	502	12/29/47	333 US 837
*Norris & Hirshberg v. S. E. C.	524	1/12/48	333 US 867
*Philadelphia Co. v. S. E. C.	480	12/17/47	333 US 828
Gately v. Hariton	488	12/22/47	333 US 838
Fook v. U. S.	519	1/7/48	333 US 838
Wheeler v. U. S.	300 misc.	1/12/48	333 US 829
Capital Transit v. Grimes	573	2/4/48	333 US 845
Patton v. U. S.	327 misc.	1/26/48	333 US 830
Griffin v. U. S.	276 misc.	1/6/48	333 US 857
Spruill v. Campbell	304 misc.	1/15/48	333 US 864
*Edgerton v. Ooms	305	8/29/47	333 US 874
*Hurley v. Lowe	751	4/19/48	334 US 828
Ritchie v. Drier	466 misc.	4/22/48	334 US 860
Gray v. U. S.	554 misc.	6/3/48	334 US 853
Solis v. Clemmer	511 misc.	5/13/48	334 US 860
U. S. v. Davis	420 misc.	4/24/48	334 US 849
Holloway v. U. S. et al	536 misc.	5/24/48	334 US 852
Hall v. U. S.	553 misc.	6/3/48	334 US 853
Romney v. U. S.	753	4/20/48	334 US 847
Barsky v. U. S.	766	4/27/48	334 US 843

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Case	No.	Date Filed	Denied
*Airline Pilots Association v. C. A. B.	858	6/10/48	93 L.Ed. 20
*Kingsland v. Carter Carburetor Corp.	123	6/25/48	93 L.Ed. 21
Billings et al v. Hill et al	158	7/16/48	93 L.Ed. 23
Boye et al v. United Services Life Ins.	215	8/11/48	93 L.Ed. 25
Felton v. U. S.	27 misc.	6/29/48	93 L.Ed. 27
*Kirkland et al v. Atlantic Coast Line	150	7/12/48	93 L.Ed. 33
*Simmons v. Federal Communications Commission	232	8/18/48	93 L.Ed. 35
*Panhandle Eastern Pipe Line v. F. P. C.	251	8/30/48	93 L.Ed. 39
McCaffrey v. U. S.	291	9/21/48	93 L.Ed. 39
Lawson v. U. S.	334	10/2/48	93 L.Ed. 42
*Brotherhood Locomotive Enginemen v. U. S.	227	9/14/48	93 L.Ed. 92
Claxton v. Schaff	354	10/15/48	93 L.Ed. 94
Harris v. U. S.	78 misc.	8/12/48	93 L.Ed. 94
*Fulton Iron Co. v. Larson	438	11/29/48	93 L.Ed. 426
Pollard v. Hawfield	450	12/6/48	93 L.Ed. 478
Meyers v. U. S.	467	12/16/48	93 L.Ed. 480
*Knowles v. War Damage Corp.	492	12/31/48	93 L.Ed. 480

B. Petitions Dismissed

Case	No.	Date Filed
Fleming v. Moberly Milk Producers Co.	1095	3/4/47

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C. Petitions Granted

Case	No.	Action	Date of Action	Citation
*Clark v. Uebersee Finanz-Korporation	934	Affirmed	12/8/47	332 US 484
*Donaldson v. Read Magazine	1108	Reversed	3/8/48	333 US 178
*Eccles v. People's Bank	1414	Reversed	3/15/48	333 US 426
*Mitchell v. Cohen	1487-8	Reversed	3/8/48	333 US 411
Bakery Sales Union v. Wagshal	225	Affirmed	3/15/48	333 US 437
Hurd et al v. Hodge et al	290-1	Reversed	5/3/48	334 US 24
*Ahrens v. Clark	446	Affirmed	6/21/48	335 US 188
Frazier v. U. S.	213 misc.	Affirmed	12/20/48	335 US 497
*Hilton v. Sullivan	560	Affirmed	6/1/48	334 US 323
McDonald et al v. U. S.	678	Reversed	12/13/48	335 US 451
Marzani v. U. S.	816	Affirmed	6/21/48	335 US 895
Upshaw v. U. S.	524 misc.	Reversed	12/13/48	335 US 410
*Domestic & Foreign Commerce v. Littlejohn	31	Pending Decision	Argued 11/12/48	—
Griffin v. U. S.	417	" "	Argued 12/15/48	—
*T. W. A. v. C. A. B.	387	" "	Argued 2/8/49	—
Eisler v. U. S.	255	Pending Argument	—	—